## Appendix A

In the

# United States Court of Appeals

For the Seventh Circuit

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No. 15654 SEPTEMBER TERM, 1966 SEPTEMBER SESSION, 1966

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PUBLIC SERVICE COMPANY OF INDIANA, INC., *Petitioner*, v. FEDERAL POWER COMMISSION, *Respondent*. } Petition To Review a Final Order of the Federal Power Commission.

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January 13, 1967

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Before KILEY, FAIRCHILD and CUMMINGS, *Circuit Judges*.

KILEY, *Circuit Judge*. The question raised by this petition to review is whether the Federal Power Commission has power to regulate the rates charged by the Public Service Company of Indiana (PSCI) in sales to its municipal and cooperative customers. The Commission order asserted jurisdiction under section 201(b) of the Federal Power Act.[1] We deny the petition and affirm the order.

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1 49 Stat. 847-48 (1935), 16 U.S.C. § 824(b) (1964).

*Appendix A*

PSCI, a public utility and Indiana corporation with its principal office in Plainfield, Indiana, operates entirely within Indiana, doing business in 69 of the 92 counties but serving only large rural areas and Indiana's smaller cities. It owns and operates five steam generating plants and has extensive power lines able to transmit large "blocks of power" to all parts of its system. It is interconnected with six other public utilities at points within Indiana or at the state line. Three of these utilities serve areas outside Indiana.[2] The sales in issue have been regulated by Indiana's Public Service Commission "for many years."

The order on appeal resulted from a proceeding initiated by a Commission order directing an investigation and public hearing to determine mainly whether PSCI's sales to Municipal Electric Systems (Municipals) and Rural Electric Membership Corporations (REMCs) were sales at wholesale in interstate commerce.[3] The Presiding Examiner found that PSCI sold out-of-state energy at wholesale to Municipals and REMCs from a power pool or coordinated multi-state electric network and recommended substantially the order which the Commission eventually entered upon adopting the Examiner's findings.

The Commission found that PSCI was interconnected with a single multi-state integrated electric power system and that PSCI's sales to its municipal and cooperative consumers were sales at wholesale in interstate com-

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2 Indiana and Michigan Electric Company serves both Indiana and Michigan, and its interconnection with PSCI is within Indiana. The other two utilities, interconnected at the state line, are Louisville Gas and Electric Company (Kentucky) and Cincinnati Gas and Electric Company (Ohio). After the hearings closed in December, 1964, PSCI interconnected with a seventh public utility, Central Illinois Public Service Company.

3 During 1963 21% of PSCI's distributed power was sold to Municipals and REMCs. Revenue from these sales in 1963 and in each of the several years prior to 1963 was approximately 11% of total revenue.

merce. This finding is vital to the Commission's jurisdiction and is the principal target of PSCI's contentions.

The ultimate finding of the Commission upon which it asserted jurisdiction is substantially that PSCI's interconnections with other public utilities locates it in a "large power pool" from which PSCI receives "large quantities" of out-of-state energy resulting in "pool sales" subject to Commission regulation.

PSCI contends that there is no substantial basis in the record for the conclusion that its sales were in interstate commerce because the Commission did not employ point-to-point tracing studies as in many previous cases. The Commission's test, it argues, was an arbitrary nonscientific "power pool" test, instead of the "engineering and scientific" test stated by the Supreme Court in *Connecticut Light & Power Co. v FPC*, 324 U.S. 515 (1945), and *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205 (1964) (the *Colton* case). In *Connecticut*, the Court said that federal jurisdiction followed an "engineering and scientific" test rather than a "legalistic or governmental" test, pointing out that "if any part of a supply of electric energy comes from outside of a state it is, or may be, present in every connected distribution facility." 324 U.S. at 529. In context, this statement emphasized the potential reach of federal jurisdiction and demonstrated the need for enforcing the local distribution facilities exception to reconcile the claims of federal and local government. The Court did not discuss the meaning of the "engineering and scientific" test.

In *Colton*, however, the Supreme Court applied the test in holding that there was substantial evidence to support FPC jurisdiction over the *sales* involved there (by a con-

ceded public utility). 376 U.S. at 209, n.5. Tracing had been used in that case and was relatively easy, since the sales involved were made to one customer. We are not persuaded that *Colton* and *Connecticut* are applicable to rule out use by the FPC of the so-called "power pool" test on the record before us. Scientific evidence can be circumstantial as well as direct.

The use of the "power pool" test was approved in both *Indiana & Mich. Elec. Co. v. FPC*, 365 F.2d 180 (7th Cir. 1966) (*I & M*), *cert. denied*, 35 U. S. L. WEEK 3200 (Dec. 6, 1966), and *Arkansas Light & Power Co. v. FPC*, No. 18262, 8th Cir., Nov. 7, 1966. In *I & M*, this court said: "We think the Commission was justified in holding that the important consideration in determining jurisdiction here is the integrated interstate pool character of the operation." 365 F.2d at 184. And in *Arkansas*, the court said it was not prepared to say that "detailed tracing studies are a *sine qua non*" to federal jurisdiction, where there is an interstate "pool assist" operation.

It is true, as the Commission found, that there are "obvious differences" between the case before us and *I & M* and *Arkansas*, in that they both "involved corporate control and centralized operation." But the distinctions which PSCI seeks to make between its operation and the operations in those two cases are not persuasive. They presuppose that PSCI is an "independent, non-affiliated electric utility which is not a member of a power pool." This presupposition flies in the face of the uncontrovertible fact that PSCI is interconnected in the same interstate network to which I & M and Arkansas Light & Power are connected. Within that network, there are several

more highly integrated "power pools," one of which includes PSCI. Its participation in this pool by virtue of its interconnections, even though only for economy and emergency purposes, results in the introduction of a substantial amount of out-of-state energy into PSCI's system.[4]

Under the Federal Power Act the findings of the Commission as to the facts, if supported by substantial evidence on the record as a whole, are conclusive. Federal Power Act § 313(b);[5] *FPC v. Southern Cal. Edison Co.*, 376 U.S. at 209, n.5. The proof in the record before us is sufficient to support an inference, to a reasonable scientific certainty, that interstate energy entered all of the sales in question and commingled with PSCI-generated energy. Thus, we hold that the Commission did not err in asserting jurisdiction over PSCI's sales to the Municipals and REMCs. *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 420 (1952); *Arkansas Power & Light Co. v. FPC, supra*; *Indiana & Mich. Elec. Co. v. FPC*, 365 F.2d at 184; *Wisconsin-Michigan Power Co. v. FPC*, 197 F.2d 472, 478 (7th Cir. 1952), *cert. denied*, 345 U.S. 934 (1953). There are three reasons for our conclusion: PSCI's interstate interconnections bring it into virtually the same multi-state system, with the same physical properties, that this court in *I & M* thought justified the Commission's finding that the resulting "pool sales" were

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4 The Commission rejected the contention that the net flow of energy into the system (0.1% of PSCI's total energy requirements) was controlling in determining the existence of out-of-state energy in the sales to the Municipals and REMCs. We think this was a permissible administrative interpretation of the Act, especially in view of the benefits accruing to PSCI under the pooling arrangement. *Cf. Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 420 (1952). These benefits include increased reliability, reduced costs and reduction of its "spinning reserve."

5 49 Stat. 860-61 (1935), as amended, 16 U.S.C. § 825*l* (1964).

in interstate commerce.[6] Second, there is a lack of practical availability of facilities for tracing interstate energy into each PSCI sale to Municipals and REMCs.[7] Finally there is confirmatory evidence by Commission expert Jessel illustrating the necessary commingling of energy transmitted into the state with PCSI-generated energy.[8]

We disagree with PSCI that the Commission's decision before us reversed the burden of proof which Congress has placed upon the Commission[9] to establish its jurisdiction by showing that the wholesale sales to the Municipals and REMCs contained out-of-state energy. *Indiana &*

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6 In the case before us the Commission found:

> PSCI argues that we are obliged to show by the tracing methods used in the past that out-of-state energy reaches the physical points of sale involved herein. While there was a difference of opinion between witnesses for PSCI and our staff as to whether it is possible to make such a tracing study, such polemics are now irrelevant in light of our decision in *Arkansas, supra.* As we observed in that case, it is an oversimplification to talk in terms of a flow of electricity from point to point in an integrated power network. Instead, generation from each source in the system contributes directly or indirectly, and to an ever varying extent, to the energy present in all parts of the system which are not isolated from out-of-state sources. This rationale is equally applicable here. There is nothing in this record which establishes that the points of sale at wholesale are isolated from out-of-state sources. On the contrary, the record here demonstrates that the nature of PSCI's system is such that out-of-state energy could, at one time or other, reach all of PSCI's customers during the periods it admittedly was brought into and permeated the backbone transmission system.

7 The Commission expert was witness Jessel, Chief of the Division of Electric Resources and Requirements of the FPC. He gave testimony that tracing was neither feasible nor practicable for studying the PSCI system. He testified that the tracing method, even with "enormous advances in techniques," would take one to two years, and if conditions changed during the study, restudy would be needed and result in "making it almost impossible" to conclude the study.

8 Jessel testified from exhibits in evidence how energy received at PSCI's Gallagher generating station is commingled with energy received from Kentucky and the commingled energy then transmitted to Gallagher's substations, lower substations and lines supplied from these substations. He did the same with respect to energy received from *I & M* and companies in Illinois and Ohio. He concluded that for the hour subject of the tracing, "out-of-state energy permeated the entire system, except possibly" through one substation.

9 60 Stat. 241 (1946), 5 U.S.C. § 1006(c) (1964).

*Mich. Elec. Co. v. FPC*, 365 F.2d at 184. We think that the Commission could find that the FPC Staff met its burden on the record before us.

We see no necessity of extensively discussing *Jersey Cent. Power & Light Co. v. FPC*, 319 U.S. 61 (1943), and *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1945), in connection with PSCI's contention that jurisdiction over the Company's sales to Municipals and REMCs is reserved to Indiana. The contention has no merit. *FPC v. Southern Cal. Edison Co.*, 376 U.S. at 209-10.

PSCI argues that because its sales to Municipals and REMCs are effected only through facilities used in local distribution, the Commission has no jurisdiction. The determination of this question involves factual questions and these are original matters for the Commission. *FPC v. Southern Cal. Edison Co.*, 376 U.S. at 210, n.6. We have found ample evidence in the record to support the Commission finding on this point.

The remaining points argued by PSCI are without merit. The argument based upon Indiana's many years of exercising jurisdiction over company rates was rejected by this court in *I & M*: "[A] history of previously unchallenged" state regulations does not oust the Commission of jurisdiction. 365 F.2d at 183. In *Wisconsin-Michigan Power Co.*, this court rejected the argument that sales to municipalities were exempt. 197 F.2d at 479. And the sales to REMCs are not exempt, because regardless of the character of the cooperatives and members, they are

persons within the meaning of section 201(d) of the Federal Power Act.[10] *Arkansas Power & Light Co. v. FPC, supra.*

AFFIRMED.

A true Copy:

Teste:

KENNETH J. CARRICK
*Clerk of the United States Court of Appeals for the Seventh Circuit.*

10 49 Stat. 848 (1935), 16 U.S.C. § 824(d) (1964).

## Appendix B

# United States Court of Appeals

**For the Seventh Circuit**

Chicago, Illinois 60604

Friday, January 13, 1967

Before

HON. ROGER J. KILEY, *Circuit Judge*
HON. THOMAS E. FAIRCHILD, *Circuit Judge*
HON. WALTER J. CUMMINGS, JR., *Circuit Judge*

No. 15654

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| PUBLIC SERVICE COMPANY OF INDIANA, INC., *Petitioner,* vs. FEDERAL POWER COMMISSION, *Respondent.* | Petition for review of an order of the Federal Power Commission. |

This cause came on to be heard on the petition for review of an order of the Federal Power Commission and the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the order entered in this cause by the Federal Power Commission on December 22, 1965, be, and the same is hereby AFFIRMED, in accordance with the opinion of this Court filed this day.

[CORRECTED]

# Appendix C

## Section 201 of the Federal Power Act, 16 U. S. C. §824, 49 Stat. 847

DECLARATION OF POLICY—APPLICATION OF PART—DEFINITIONS

Sec. 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

## Section 205 of the Federal Power Act, 16 U. S. C. §824d, 49 Stat. 851

### Rates and Charges—Schedules—Suspension of New Rates

Sec. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the

jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, services, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into

effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and

in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

## Section 206 of the Federal Power Act, 16 U. S. C. §824e, 49 Stat. 852

POWER OF COMMISSION TO FIX RATES AND CHARGES—DETERMINATION OF COST OF PRODUCTION OR TRANSMISSION

Sec. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the

request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

**Section 313(b) of the Federal Power Act, 16 U. S. C. §825*l*(b), 49 Stat. 860 as Amended 62 Stat. 991, 63 Stat. 107, 72 Stat. 947**

REHEARINGS: COURT REVIEW OF ORDERS

Sec. 313.

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(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code.

Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).